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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RAMIRO GAMEZ, Defendant and Appellant.	B149547 (Super. Ct. No. BA166938)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig E. Veals, Judge. Affirmed as modified.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, David C. Cook and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Ramiro Gamez appeals from a judgment entered after the trial court found him in violation of probation and sentenced him to state prison for the term prescribed by law. We modify, and as modified, affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In an information filed on September 29, 1998, the Los Angeles District Attorney charged defendant with murder (Pen. Code, § 187[1]; count one) and attempted murder (§§ 664, 187; count two). Enhancement allegations also were alleged. On February 11, 1999, the trial court declared a mistrial after the jury deadlocked.

On February 16, 1999, pursuant to a plea agreement, the trial court granted the People's motion to amend count one of the information to charge manslaughter (§ 192, subd. (a)), rather than murder. Defendant, in turn, entered a plea of no contest to the manslaughter count.

The trial court suspended imposition of sentence and placed defendant on probation for three years. As a condition of probation, defendant was required to serve one year in county jail. The trial court gave defendant presentence custody credit for 462 days, consisting of 308 days actually served and 154 days of good time/work time credit. The court also imposed a $200 restitution fine (§ 1202.4). On the motion of the People, the trial court dismissed the remaining attempted murder count in the interests of justice.

On January 2, 2001, defendant was arrested after Charlotte Alonzo, the mother of his child, reported that he had beaten her.[2] Following a probation violation hearing held

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[1] All statutory references hereinafter are to the Penal Code unless otherwise specified.

[2] We need not detail the facts underlying defendant's offense against Ms. Alonzo, as they are not pertinent to the issues raised on appeal.

on April 6, 2001, during which defendant denied hitting Ms. Alonzo, the trial court found that "clearly [defendant] is in violation of probation."

The trial court then sentenced defendant to state prison for the high term of 11 years. With regard to custody credits, the trial court noted that voluntary manslaughter is a serious or violent felony within the meaning of section 667.5, subdivision (c). It concluded, therefore, that defendant was entitled only to 15 percent credits and that he previously had been given more credits than he was entitled to. The court then calculated defendant's credits as follows: "original 308 days credit, plus 46 good time/work time credits. And since his arrest an additional 95 actual, plus 14 goodtime/work time credits, grand total of 473."[3]

The trial court further imposed a $200 restitution fine (§ 1202.4), a $200 domestic violence assessment (§ 1203.097), a $250 parole revocation fine (§ 1202.45), a $100 state penalty assessment (§ 1464) and a $70 county penalty assessment (Gov. Code, § 76000).

On April 23, 2001, the trial court corrected its April 6 minute order nunc pro tunc "by adding: [¶] 'The court finds the defendant in violation of probation. The defendant receives custody credits as follows: 403 actual days plus 60 days good time/work time for a total of 463 days credit.'"

CONTENTIONS

I

Defendant contends the domestic violence fee imposed pursuant to section 1203.097 must be stricken.

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[3] Defendant acknowledges that this actually adds up to 463 days.

II

Defendant also contends the penalty assessments imposed pursuant to section 1464 and Government Code section 76000 must be stricken.

III

Next, defendant asserts that the restitution fine imposed pursuant to section 1202.45 must be reduced to $200.

IV

Finally, defendant claims an entitlement to additional presentence credits.

DISCUSSION

I

Defendant contends the domestic violence fee imposed pursuant to section 1203.097 must be stricken. The People agree, as does this court.

The trial court ordered defendant to pay a $200 domestic violence assessment pursuant to section 1203.097. By its terms, section 1203.097 only applies when probation is granted for a crime of domestic violence. Here, the trial court did not place defendant on probation for a crime of domestic violence. Rather, it sentenced him to state prison for the crime of manslaughter. Section 1203.097 therefore is inapplicable. The fee imposed pursuant to that statutory provision must be stricken.

II

Defendant also contends the penalty assessments imposed pursuant to section 1464 and Government Code section 76000 must be stricken. There is merit to this contention, as the People concede.

The trial court imposed a $100 state penalty assessment pursuant to section 1464, as well as a $70 county penalty assessment pursuant to Government Code section 76000, without specifying to what fine these assessments applied.

Although in part I, *ante*, we concluded that the domestic violence assessment must be stricken, we note that a domestic violence assessment imposed pursuant to section 1203.097 is not subject to state and county penalty assessments. (81 Ops.Cal.Atty.Gen. 131, 133, 134 (1998).) The restitution and parole revocation fines imposed pursuant to sections 1202.4 and 1202.45 also are not subject to such assessments. (§ 1202.4, subd. (e); *People v. McHenry* (2000) 77 Cal.App.4th 730, 732, 733-734; *People v. Dorsey* (1999) 75 Cal.App.4th 729, 731, 736, 738;) Inasmuch as there was no proper basis for the trial court's imposition of the state and county penalty assessments, they must be stricken.

III

Next, defendant asserts that the restitution fine imposed pursuant to section 1202.45 must be reduced to $200. We agree.

The trial court ordered defendant to pay a $200 restitution fine pursuant to section "1202.4 (c) [*sic*]," [4] as well as a $250 parole revocation fine pursuant to section 1202.45. A fine imposed pursuant to section 1202.45 must be "in the same amount" as the

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[4] It appears that the trial court misspoke. It should have stated subdivision (b) of section 1202.4 instead. Neither the abstract of judgment nor the court's minute order reflects the imposition of any restitution fine pursuant to section 1202.4, subdivision (b).

restitution fine imposed pursuant to section 1202.4, subdivision (b). (§ 1202.45.) Therefore, the parole revocation fine imposed pursuant to section 1202.45 must be reduced from $250 to $200.

IV

Finally, defendant claims an entitlement to additional presentence credits. The claim is meritless.

Defendant does not quarrel with the 308 days of actual confinement credit he received at the original sentencing hearing. He also does not quarrel with the trial court's determination that he was entitled to receive conduct credits for only 15 percent of the actual time he spent in custody. (See § 2933.1.) Defendant asserts only that, as to current violation, he was entitled to 112 days, rather than 95 days, of actual custody credit. This assertion is premised on the mistaken belief that he was sentenced on April 23, 2001. He was not.

The reporter's transcript reveals that the trial court sentenced defendant to state prison on April 6, 2001. On April 23, 2001, the court simply corrected its April 6, 2001 minute order nunc pro tunc to reflect the trial court's finding that defendant had violated his probation and was to receive custody credits of 463 days, consisting of 403 days actually spent in custody and 60 days of good time/work time credit.

The abstract of judgment, which was prepared and filed on April 25, 2001, confirms that the probation revocation hearing was held and defendant was sentenced on April 6, 2001. The abstract further reveals that, upon being sentenced, "defendant [was] remanded to the custody of the sheriff . . . forthwith."

The trial court properly found that defendant spent an additional 95 days in actual custody between January 2, 2001, the day he was arrested for his crime against Ms. Alonzo, and April 6 when he was sentenced for violating his probation. (§ 2900.5; see, e.g., *People v. Herrera* (2001) 88 Cal.App.4th 1353, 1365.) Defendant's actual time in confinement, therefore, totaled 403 days as stated by the trial court. To this the trial court

properly added 60 days good time/work time credit (15 percent of 403) to arrive at defendant's presentence custody credit of 463 days. (§ 2933.1; *People v. Caceres* (1997) 52 Cal.App.4th 106, 110-111.) Defendant has failed to establish any error in the trial court's calculation.

The judgment is modified to strike the $200 domestic violence assessment imposed pursuant to section 1203.097, the $100 state penalty assessment imposed pursuant to section 1464 and the $70 county penalty assessment imposed pursuant to Government Code section 76000. The judgment is modified further to reflect the imposition of a $200 restitution fine pursuant to section 1202.4, subdivision (b), and to reduce the parole revocation fine imposed pursuant to section 1202.45 from $250 to $200. As modified, the judgment is affirmed. The clerk of the trial court is directed to prepare a corrected abstract of judgment consistent with this opinion and forward a copy to the Department of Corrections.

NOT TO BE PUBLISHED

SPENCER, P.J.

We concur:

ORTEGA, J.

VOGEL (MIRIAM A.), J.